(1)

Supreme Court, U.S.
FILED

JUN 28 2001

OFFICE OF THE CLERK

No. 01-4

IN THE

Supreme Court of the United States

WINDSOR HOUSING FOUNDATION,
Petitioner,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE; FRANK GRANGER III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of Louisiana, First Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES M. GARNER
Counsel of Record
RICHARD P. RICHTER
JOSHUA S. FORCE
MICHAEL H. PINKERTON
SHER GARNER CAHILL RICHTER KLEIN MCALISTER & HILBERT, L.L.C.
Twenty-Eighth Floor
909 Poydras Street
New Orleans, Louisiana 70112
(504) 299-2100
Counsel for Petitioner, Windsor Housing Foundation

June 28, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

37 pp

QUESTIONS PRESENTED

1. Whether the State of Louisiana's requirement that a tax-exempt, nonprofit entity pay an illegally assessed tax, under protest by a deadline, to preserve its right to challenge the tax denies that entity due process under the Fourteenth Amendment to the United States Constitution, as well as under *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), and *Carpenter v. Shaw*, 280 U.S. 363 (1930).

2. Whether the State of Louisiana's post-deprivation tax collection scheme as applied to persons exempt from the payment of taxes abridges the fundamental right of access to the courts as guaranteed by the First Amendment right to petition for redress of grievances and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

RULE 29.1 LISTING

Petitioner Windsor Housing Foundation is presently known as Gateway Housing Foundation. Gateway Housing Foundation has no parent company. Gateway Eden Point, L.L.C., a Louisiana limited liability company, is a wholly-owned subsidiary of Gateway Housing Foundation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. DECISIONS OF LOUISIANA STATE COURTS IN THIS CASE AND OTHERS CONFLICT WITH THIS COURT'S HOLDINGS IN *McKESSON CORP. v. DIVISION OF ALCOHOLIC BEVERAGES* AND *CARPENTER v. SHAW*	6
II. LOUISIANA'S TAX SCHEME ABRIDGES PROTECTED CONSTITUTIONAL RIGHTS..	
A. Louisiana's Tax Collection Practices Violate the Due Process Clause of the Fourteenth Amendment	10
B. Louisiana's Tax Collection Practices Abridge the Fundamental Right of Access to the Courts Under the First and Fourteenth Amendments	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991) 10
Boddie v. Connecticut, 401 U.S. 371 (1971) 11, 12, 13
California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 12
Capital Drilling Co. v. Graves, 496 So. 2d 487 (La. Ct. App. 1986) 6
Carpenter v. Shaw, 280 U.S. 363 (1930) 8, 10
Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907) 12
Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) 7
Comm-Care Corp. v. Louisiana Tax Comm'n, 681 So. 2d 1001 (La. Ct. App. 1996), *rev'd on other grounds*, 706 So. 2d 425 (La. 1998) 6
Fuentes v. Shevin, 407 U.S. 67 (1972) 11
Gaar, Scott & Co. v. Shannon, 223 U.S. 468 (1912) 9
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10
Lowe v. Scott, 959 F.2d 323 (1st Cir. 1992) 10
McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).. 12
McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990) 4, 6, 7, 9, 10, 11
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 13, 15
NAACP v. Button, 371 U.S. 415 (1963) 12
Reich v. Collins, 513 U.S. 106 (1994) 7
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983)... 12
United States v. State Tax Comm'n, 412 U.S. 363 (1973) 9
United States v. State Tax Comm'n, 645 F.2d 4 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981) 9

TABLE OF AUTHORITIES—Continued

Page

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 12

Ward v. Board of County Comm'rs, 253 U.S. 17 (1920) 8, 9, 10

CONSTITUTIONS

U.S. CONST. amend. I 2, 12

U.S. CONST. amend. XIV, § 1 ..... 2, 12

LA. CONST. art. VII, § 21(B)(1)(a) 2

STATUTES

28 U.S.C. § 1257(a) (2000) 2

I.R.C., § 501(c)(3) (West Supp. 2000) 2

La. REV. STAT. ANN. § 47:2101(A)(1) (West Supp. 2000) 2, 4, 9

La. REV. STAT. ANN. § 47:2110(A)(2) (West Supp. 2000) 2, 3

IN THE

Supreme Court of the United States

No. ——

WINDSOR HOUSING FOUNDATION,
Petitioner,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE; FRANK GRANGER III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of Louisiana, First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Windsor Housing Foundation respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of Louisiana, First Circuit, in this case.

OPINIONS BELOW

The opinions of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, (App. D) and the Louisiana Court of Appeal, First Circuit, (App. C) are unreported. The Supreme Court of Louisiana's orders denying Petitioner Windsor Housing Foundation's applications for a writ of certiorari (App. B) and for reconsideration (App. A) are also unreported.

JURISDICTION

The Court of Appeal of Louisiana, First Circuit, entered judgment on December 22, 2000, affirming the final judgment entered by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, which dismissed the claims of Petitioner, Windsor Housing Foundation, with prejudice. The Supreme Court of Louisiana denied an application for a writ of certiorari, by a 4-3 vote, on March 30, 2001. The Supreme Court of Louisiana denied an application for rehearing on May 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000).

STATUTORY PROVISIONS INVOLVED

The text of the following statutory provisions relevant to this petition for a writ of certiorari is reprinted in Appendix E; First and Fourteenth Amendments to the United States Constitution, U.S. CONST. amends. I, XIV, § 1; Article VII, Section 21(B)(1)(a) of the Louisiana Constitution of 1974, LA. CONST. art. VII, § 21(B)(1)(a); Title 47, Sections 2101(A)(1) and 2110(A)(2) of the Louisiana Revised Statutes, LA. REV. STAT. ANN. §§ 47:2101(A)(1), 47:2110(A)(2).

STATEMENT OF THE CASE

The petitioner in this case is Windsor Housing Foundation ("Windsor"), a tax-exempt, charitable organization that has been unconstitutionally subjected to an *ad valorem* tax in direct contravention of this Court's precedent. [1] Windsor's mission is to relieve the burden on the poor and distressed by

---

[1] Windsor, currently known as Gateway Housing Foundation, operates as a foreign, nonprofit corporation authorized to do and doing business in Louisiana and is exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1986, as amended. I.R.C. § 501(c)(3) (West Supp. 2000).

promoting social welfare through the combat of community deterioration. Specifically, Windsor owns and operates a multi-family, residential housing complex in Louisiana in an effort to help the less fortunate. To accomplish its mission, Windsor ensures that low and/or moderate-income families occupy a minimum number of the complex's units, thereby assisting in the social and economic integration of economically disadvantaged residents into the community.

As a tax-exempt, charitable organization, Windsor is *immune* from *ad valorem* taxation pursuant to the Louisiana Constitution. *See* App. E. In particular, the Louisiana Constitution provides that property owned by a nonprofit corporation and operated for charitable purposes is exempt from *ad valorem* taxation. *Id.* Although Windsor maintained tax-exempt status consistent with both federal and state constitutional law, Louisiana unlawfully assessed its property and imposed *ad valorem* taxes on Windsor for the 1998 tax year in the amount of $44,505.00. Windsor did not pay the tax assessment by December 31 of that year. Instead, Windsor paid $45,840.15 in illegally assessed taxes and penalties with interest, "under protest," on or about March 29, 1999. On that date, Windsor provided notice of its intention to file suit for the recovery of these taxes.

Respondent, Sheriff and *Ex-Officio* Tax Collector, Elmer B. Litchfield ("the Collector"), refused to return the tendered sums because Windsor had made its payment under protest *after* the December 31, 1998 delinquency date. The Collector maintained this position in spite of the fact that Windsor was exempt from *ad valorem* taxation under the provisions of the Louisiana Constitution. As a result, Windsor filed this suit within thirty days of its payment pursuant to Louisiana Revised Statute § 47:2110. *Id.*

In response to Windsor's suit, on May 6, 1999, the Collector filed a peremptory exception of prescription/peremption and no cause of action. The Collector urged

the trial court to enforce a December 31 delinquency date and bar Windsor's right to recover based on Louisiana Revised Statute § 47:2101(A)(1), which states that taxpayers who fail to pay their property taxes before December 31 of a given year "may have their property noticed, advertised, and sold." App. E. Windsor opposed the Collector's exception and argued, *inter alia*, that Louisiana's tax collection scheme, as interpreted and enforced by the Collector, violated Windsor's rights under the Fourteenth Amendment to the United States Constitution. Windsor contended further that this scheme, as applied, unfairly burdened its rights as a tax-exempt, charitable organization. In particular, Windsor argued that the State's tax collection practices provided it with an inadequate period of time to protest the tax.

After hearing oral argument on the issue, Judge Curtis A. Calloway of the Nineteenth Judicial District Court for the Parish of East Baton Rouge granted the Collector's exception and dismissed Windsor's constitutionally protected claims, with prejudice, on August 26, 1999. App. D. The District Court did not expressly address Windsor's constitutional arguments in its judgment. *See id.* Windsor subsequently appealed the District Court's judgment to the Louisiana Court of Appeal, First Circuit, renewing its constitutional and other challenges. The Court of Appeal erroneously affirmed the decision of the lower court on December 22, 2000, finding, in part, that the Louisiana tax scheme presented no due process violations under *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990). App. C at 10a.

Thereafter, Windsor filed an application for a writ of certiorari with the Supreme Court of Louisiana. Windsor argued, once again, that Louisiana's tax collection practices, as interpreted and applied by its courts, violated its Fourteenth Amendment rights and unfairly burdened it as a tax-exempt entity. Windsor explained further that the State's tax collection practices discriminated against Windsor by

providing it with an inadequate period of time to protest the tax, which also differed from the amount of time available to taxpayers in other parishes. On March 30, 2001, the Supreme Court of Louisiana denied Windsor's application for a writ of certiorari, without opinion, by a 4-3 vote. App. B. The Louisiana Supreme Court later denied Windsor's application for reconsideration on May 11, 2001. App. A. Windsor now petitions for a writ of certiorari from this Court based on a conflict between the holdings of the Louisiana courts construing Louisiana's tax scheme and this Court's precedent as well as Louisiana's violation of important constitutional rights.

REASONS FOR GRANTING THE PETITION

This case necessitates this Court's intervention because Louisiana's tax collection practices, as interpreted by its courts, run roughshod over this Court's precedent and the First and Fourteenth Amendments. This Court should grant certiorari because Louisiana's post-deprivation scheme for challenging an illegal tax is unconstitutional as applied to tax-exempt entities. The scheme directly contravenes *this* Court's precedent, which establishes that state post-deprivation schemes for the recovery of taxes violate the Due Process Clause of the Fourteenth Amendment when applied to entities wholly exempt from taxation. Additionally, by requiring a tax-exempt entity to pay a tax to protest its illegal assessment, Louisiana impairs these entities' access to the courts and denies them a meaningful opportunity to be heard under the First and Fourteenth Amendments.

I. DECISIONS OF LOUISIANA STATE COURTS IN THIS CASE AND OTHERS CONFLICT WITH THIS COURT'S HOLDINGS IN *McKESSON v. DIVISION OF ALCOHOLIC BEVERAGES* AND *CARPENTER v. SHAW.*

In *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 39 (1990), this Court held that to satisfy the demands of the Due Process Clause of the Fourteenth Amendment, a state must provide taxpayers with both a "fair opportunity" to challenge the legality of a tax and a "clear and certain remedy" for any unlawful tax collection. Although the *McKesson* Court recognized a state's freedom to impose various procedural restraints on *taxpayers*' actions for relief from wrongful taxes, such as relatively short statutes of limitations, the Court also stressed that if the entities were *immune from taxation*, no corrective action by the state could cure the invalidity of the tax. *Id.* at 39, 45. In fact, the Due Process Clause of the Fourteenth Amendment mandates a state's refund of such unlawful taxes. *Id.* at 39.

Louisiana's post-deprivation scheme, as construed by the Louisiana courts, violates the due process demands of *McKesson* by failing to provide tax-exempt organizations a "clear and certain remedy" and a "fair opportunity" to challenge an illegally assessed tax. The relevant Louisiana statutes are neither clear nor certain, but ambiguous, and do not expressly provide that a tax-exempt entity, or any other property owner, waives the right to challenge an illegal tax if it pays the tax under protest after December 31 of a given year. *See* App. E. Nonetheless, one state appellate circuit has read this requirement into the statutory scheme to the detriment of nonprofit organizations that reasonably rely on their tax-exempt status to fulfill their charitable missions. *See Comm-Care Corp. v. Louisiana Tax Comm'n*, 681 So. 2d 1001, 1006 (La. Ct. App. 1996), *rev'd on other grounds*, 706 So. 2d 425, 427 (La. 1998); *see also Capital Drilling Co. v. Graves*, 496

So. 2d 487, 492 (La. Ct. App. 1986). From the standpoint of the average taxpayer reading the statutes in question, the remedy provided by Louisiana is neither clear nor certain.[2] Nonetheless, the Supreme Court of Louisiana has allowed this unconstitutional statutory scheme to be applied *despite the fact that it conflicts with this Court's precedent.*[3]

Indeed, Louisiana does not provide tax-exempt, nonprofit entities with a fair and meaningful opportunity to challenge illegal taxes, as this Court mandated in *McKesson*. Requiring a charitable entity to pay an illegal tax under protest by December 31 of a given year, regardless of when it received the tax bill, precludes many of these entities from ever being able to challenge the tax. Logically, an entity that reasonably believes it will not have to pay a tax will not reserve funds for that purpose; rather, it likely will allocate any available funds toward its charitable mission. Unlike a for-profit corporation, this Court has recognized that nonprofit organizations have traditionally been organized specifically to provide community services, rather than to engage in commerce for the benefit of their shareholders. *Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987). Louisiana unconstitutionally deprived Windsor of $44,505.00 in *ad valorem* taxes and thus prevented Windsor from using this money to improve the quality of housing for lower income residents in Louisiana. Windsor respectfully requests

---

[2] In *Reich v. Collins*, 513 U.S. 106, 111 (1994), this Court used the standard of "the average taxpayer" in interpreting the language of the state refund statute.

[3] The Court of Appeal of Louisiana, First Circuit, disingenuously and incorrectly claimed to follow *McKesson*, in this case, by briefly noting that a state could choose to provide *taxpayers* with a post-deprivation remedy for unlawful taxes and that states could subject actions to short statutes of limitations. App. C. at 10a. The Court of Appeal failed to note the language in *McKesson* stating that the post-deprivation rationale did not apply to entities, such as Windsor, wholly immune from taxation. *McKesson*, 496 U.S. at 45.

this Court to rectify the unconstitutional tax collection practices in Louisiana and thereby protect the essential social benefits provided by charitable organizations, such as Windsor, from a constitutionally infirm taxation scheme.

By barring a tax-exempt entity from recovering illegally assessed taxes, the Louisiana courts have not only misapplied this Court's holding in *McKesson*, but have also ignored *Carpenter v. Shaw*, 280 U.S. 363 (1930), and its progeny. In *Carpenter*, a case closely analogous to the present one, the State of Oklahoma illegally taxed land that belonged to tax-exempt Native American tribes. *Id.* at 365. The tribes paid the taxes under protest, and the state alleged that the tribes were precluded from recovering the taxes because they had failed to pay them timely. *Id.* at 369. This Court rejected the state's argument, however, and held that a denial by a state of the right to recover taxes paid by coercion itself contravenes the Fourteenth Amendment. *Id.* (*citing Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920)).[4] The Court held that a failure to follow state procedural requirements could not bar recovery of an illegally assessed tax by an entity that was *wholly exempt from taxation*. *Carpenter*, 280 U.S. at 368.

Like the tribes' property in the *Carpenter* and *Ward* cases, Windsor's property was wholly exempt from the assessment of state *ad valorem* taxes. The tax Windsor was required to pay was illegal from the moment it was assessed. Therefore, Windsor's failure to adhere to the December 31 delinquency date imposed by the Louisiana courts should not have precluded Windsor from recovering its payment.

---

[4] The facts of *Ward* are similar to those of *Carpenter* and are also analogous to the facts of this case. In the former case, too, the State of Oklahoma wrongfully taxed land belonging to Native American tribes. *Ward*, 253 U.S. at 18. The Court held that the state's retention of the taxes paid was a violation of the tribes' right to due process of law under the Fourteenth Amendment.

In addition, as in *Carpenter* and *Ward*, Windsor paid the *ad valorem* tax under duress because, by not paying it, Windsor would have risked the forced sale of its property.[5] This Court has long held that, when a tax is paid to avoid financial sanctions or a seizure of real property, the tax is paid under "duress."[6] Interestingly, the *McKesson* Court noted that "courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made." 496 U.S. at 32. This Court should grant certiorari because a state's retention of a tax illegally assessed against a tax-exempt entity is as much a violation of the Constitution as the collection of that tax in the first place. *United States v. State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), *cert denied*, 454 U.S. 896 (1981). Here, Louisiana has not only illegally assessed Windsor with a tax but has also refused to refund it to Windsor.

The Louisiana tax scheme, as interpreted and enforced by the courts of that state, conflicts with this Court's rulings in *McKesson* and *Carpenter* and, thus, the mandates of the Fourteenth Amendment's Due Process Clause. The precedent established by this Court, in these cases, assures that an entity is not deprived of the property right inherent in its tax-exempt status without due process of law. This Court should also ensure that state tax collectors can no longer send tax bills to entities they know to be exempt and later preclude those entities from recovering their money under a procedural

---

[5] According to LA. REV. STAT. ANN. § 47:2101(A)(1) (West Supp. 2000), taxes should be paid on or before the thirty-first of December in each respective year to avoid notice, advertisement, and the sale of the property. App. E.

[6] *McKesson*, 496 U.S. at 39 (*citing United States v. State Tax Comm'n*, 412 U.S. 363, 368 (1973) (economic sanctions for nonpayment of tax)); *Ward*, 253 U.S. at 23 (distress sale of land for nonpayment); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912) (economic sanctions and distress sale of land for nonpayment).

statute that, as discussed below, is arbitrary and unevenly applied. Louisiana's scheme, as interpreted by its courts, is a flagrant violation of *McKesson* and *Carpenter*, and this Court should grant certiorari to address Louisiana's deviation from that precedent.

II. LOUISIANA'S TAX SCHEME ABRIDGES PROTECTED CONSTITUTIONAL RIGHTS.

A. Louisiana's Tax Collection Practices Violate the Due Process Clause of the Fourteenth Amendment.

Tax-exempt status is a vested property right, which, through the dictates of the Fourteenth Amendment, cannot be taken by a state without due process of law. *Ward*, 253 U.S. at 19. Louisiana has deprived Windsor of its tax-exempt status *without due process of law by compelling it to pay an illegally assessed tax* and then denying it the right to challenge and recover the tax because the protest payment was not timely made. "A denial by a state court of recovery of taxes exacted in violation of the Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *McKesson*, 496 U.S. at 34 (*citing Carpenter*, 280 U.S. at 369). The fact that the property right was granted by the Louisiana Constitution and not the United States Constitution is irrelevant: the hallmark of property is an individual entitlement grounded in *state law*, which cannot be usurped except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).[7]

---

[7] Tax-exempt status is analogous to professional licenses, which are property rights granted by the state but which cannot be removed without due process of law under the United States Constitution. *See Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992) (recognizing license to practice medicine as a property right); *Amsden v. Moran*, 904 F.2d 748, 752 (1st Cir. 1990) (recognizing land surveying license as a property right subject to due process protections), *cert. denied*, 498 U.S. 1041.

Louisiana's post-deprivation scheme fails to follow this Court's long-established requirement that every person has the right to a hearing before a deprivation of property under the Due Process Clause. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). This Court has also recognized that postponement of a hearing until post-deprivation is justified only in "extraordinary situations" where a valid governmental interest or a special need for immediate action exists. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Fuentes*, 407 U.S. at 91. These two elements justified the *McKesson* Court's holding that a post-deprivation scheme could be used to secure revenues *from taxpayers*. *McKesson*, 496 U.S. at 37. This rationale fails, however, when applied to *non-taxpayers*, such as charitable organizations, that have not been subject to such a tax in previous years. Because the State and its parishes cannot reasonably rely on collecting these revenues from tax-exempt entities, no legitimate governmental interest in a prompt exaction exists that could justify an exception to the pre-deprivation requirement of the Due Process Clause. Louisiana should not be allowed to circumvent due process requirements by feigning a legitimate governmental interest under the rationale of *Fuentes* and *Boddie*, thereby allowing a taking of property before affording a non-taxpayer the opportunity to be heard.

It is important that the constitutional rights of tax-exempt organizations and others not be abridged at the whim of the state. One of the essential aspects of the American judicial framework, grounded in both law and tradition, is that a person is guaranteed an opportunity to confront the state when it deprives them of life, liberty, or property. *Fuentes*, 407 U.S. at 80-82. In the present case, where no extraordinary circumstances exist, Louisiana's tax collection practices severely infringe on Windsor's right to due process and can only be justified under "extraordinary" circumstances, which are not present here. *See Boddie*, 401 U.S. at 379.

As discussed above, because Windsor's property was wholly exempt from state *ad valorem* taxation in the first place and because Windsor was required to pay the tax under duress and coercion, Louisiana's retention of the illegal tax is a blatant violation of the Due Process Clause of the Fourteenth Amendment. This case directly implicates the protections of the Fourteenth Amendment. Windsor respectfully requests that this Court grant certiorari to scrutinize this unconstitutional system of taxation.

B. Louisiana's Tax Collection Practices Abridge the Fundamental Right of Access to the Courts Under the First and Fourteenth Amendments.

This Court has recognized the constitutionally protected right of access to the courts under the First Amendment to the United States Constitution. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972). The historical basis of this right lies in the First Amendment's right to petition the government for a redress of grievances. U.S. CONST. amend. I. Given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances, it seems clear that the Framers intended to impose a duty on the government to provide aggrieved parties with a fair hearing. This Court and the United States Courts of Appeals have since embraced and protected this notion—the fundamental right of access to the courts—under the right to petition for a redress of grievances provision of the First Amendment and the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. I, XIV, § 1; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (*citing NAACP v. Button*, 371 U.S. 415 (1963)); *Boddie*, 401 U.S. at 371; *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (*citing Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907)); *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972).

The Due Process Clause requires that a meaningful opportunity to be heard must be provided and that a "mere gesture" is constitutionally inadequate. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). For example, the *Boddie* Court held that requiring an indigent to pay a fee to gain access to the courts to dissolve a marriage did not satisfy the Due Process Clause requirements of the Fourteenth Amendment. *Boddie*, 401 U.S. at 380. The *Boddie* Court noted the historical importance of marriage, a protected interest, and the governmental monopoly of the dissolution of marriages. *Id.* at 376-77. Therefore, a violation of due process of law occurred because, in Connecticut, the only way to obtain a divorce was through the courts. *Id.* This Court recognized that the fee requirement, in *Boddie*, offended due process where it operated to foreclose a particular party's opportunity to be heard. *Id.* at 380.

Louisiana law, as currently applied, requires Windsor, a tax-exempt entity, to pay an illegally assessed tax to preserve its right of access to the courts to contest that tax. If a tax-exempt entity fails or is unable to pay that tax within a small window of time, it is thereafter barred from recovering any payment of that tax, irrespective of whether that payment was made under protest or whether the tax was ever due. In other words, the tax-exempt entity cannot recover the taxes paid even though the assessment was unlawful in the first place. Because property rights are constitutionally protected and the judicial system is the sole avenue of relief to recoup an illegally assessed tax, Windsor's right of access to the courts to redress its grievances is being infringed under this Court's holding in *Boddie*.

A charitable organization under Louisiana's taxation scheme is analogous to an indigent petitioner under *Boddie*. A charitable organization works under the obvious assumption that because it has traditionally been afforded tax-exempt status by federal and state governments, it need not

keep a reserve of money for taxes. Under Louisiana's current tax collection scheme, however, if a tax-exempt entity cannot or does not generate funds to pay an unexpected tax within a small window of time, the State compels the tax-exempt organization to choose between paying the illegally assessed tax, without any available recoupment procedure, or risking the forced seizure and sale of its property. This coercive, post-deprivation scheme precludes any meaningful opportunity to be heard. Where a person is incapable of paying a fee (e.g., indigents) or is immune from paying one (e.g., tax-exempt organizations), the requirement that a fee be paid to gain access to the only avenue of relief denies that person, such as Windsor, its constitutionally protected right of access to the courts to redress its grievance as required by the First and Fourteenth Amendments to the United States Constitution. The toll charged by the State as the price of admission to its courts effectively closes the doors of the courthouse to tax-exempt organizations, such as Windsor.

When a tax-exempt entity, which by definition is *not* subject to an *ad valorem* tax, is assessed a tax, it is counter-intuitive to require that entity to pay the tax as a precondition to contesting the illegally assessed tax. This framework is akin to requiring an indigent to pay a thousand-dollar fee before being allowed to proceed *in forma pauperis*. Such a requirement is not only absurd in its application but also defeats the very purpose behind allowing nonprofit, charitable organizations to be tax-exempt. For a charitable organization, such as Windsor, to fulfill its mission to provide low to moderate-income housing, it must put its money into charitable works. If such an organization is required, instead, to allocate funds for the possibility that the state might arbitrarily and illegally decide to assess it with a tax, that entity will not be able to fulfill its mission, which is the very purpose that afforded it the right to tax-exempt status in the first place. Such a system defies reason and logic.

The current Louisiana scheme places an undue burden on a tax-exempt, nonprofit organization and is subject to serious abuse by a tax assessor. Even if a tax-exempt entity manages to pay an illegally assessed tax under protest before the delinquency date, the charitable entity may be unable to bear the financial burden of litigation expenses to recoup that payment. Alternatively, if the entity fails or is unable to pay the illegally assessed tax by the delinquency date, Louisiana then compels its property owners to choose between two takings of property. Either on the one hand, the entity must pay an overdue, illegally assessed *ad valorem* tax without recoupment proceedings or, on the other hand, have its real property seized and sold for failure to pay the illegitimate *ad valorem* tax. This scheme does not satisfy the minimum requirements of an opportunity to be heard as required by this Court. Rather, Louisiana's tax collection practices subject tax-exempt entities, such as Windsor, to an unconstitutional Catch-22. The due process afforded in this situation is "merely a gesture," at best, and effectively denies a tax-exempt organization a meaningful right of access to the courts. *Mullane*, 339 U.S. at 315. Accordingly, this Court should grant certiorari to determine whether this predatory tax scheme unconstitutionally denies a tax-exempt entity its fundamental right of access to the courts.

CONCLUSION

The State of Louisiana has patently disregarded the mandate of this Court and the Constitution. Louisiana's tax collection practices, as construed and enforced by its courts, have subjected Windsor to a flagrant and improper deprivation of its constitutionally protected rights. These practices directly contravene this Court's holdings in *McKesson* and *Carpenter*, which establish that post-deprivation schemes for the recovery of taxes violate the Fourteenth Amendment's Due Process Clause when applied to tax-exempt entities, such as Windsor. By requiring tax-exempt entities to pay a tax to protest its illegal assessment, Louisiana likewise impairs those entities' access to the courts and denies them a meaningful opportunity to be heard under the First and Fourteenth Amendments.

Indeed, by imposing an *ad valorem* tax on Windsor, a charitable organization *exempt from taxation*, Louisiana's tax collection practices undermine the very purpose for which Louisiana and the federal government granted Windsor tax-exempt status in the first place. Louisiana's taxation scheme, as applied to Windsor (and other tax-exempt organizations), prevents Windsor from fulfilling its charitable mission of providing housing to the economically disadvantaged citizens of Louisiana. As a result, Louisiana's assessment of *ad valorem* taxes on Windsor is not only repugnant to this Court's precedent and the protections afforded by the First and Fourteenth Amendments but also discourages the very charitable works upon which Windsor's tax-exempt status is based. Windsor respectfully requests, therefore, that this Court grant certiorari to address both the conflict between the decisions of the Louisiana courts below and this Court's precedent and the important constitutional issues implicated by Louisiana's egregious, unfair, and coercive tax collection practices.

Respectfully submitted,

JAMES M. GARNER
Counsel of Record
RICHARD P. RICHTER
JOSHUA S. FORCE
MICHAEL H. PINKERTON
SHER GARNER CAHILL RICHTER KLEIN
MCALISTER & HILBERT, L.L.C.
Twenty-Eighth Floor
909 Poydras Street
New Orleans, Louisiana 70112
(504) 299-2100

Counsel for Petitioner, Windsor Housing Foundation *

June 28, 2001

---

* Counsel for Windsor would like to acknowledge the assistance and contributions of Angela Eddins of Loyola University of New Orleans, School of Law, and Raven Moore and Nicole Tortarolo of Tulane Law School in the preparation of this petition.